BEFORE THE
FEDERAL MARITIME COMMISSION

GLOBAL LINK LOGISTICS, INC.	)	
Complainant,	)	
v.	)	**Docket No. 13-07**
HAPAG-LLOYD AG,	)	
Respondent.	)	

MOTION TO DISMISS

Respondent Hapag-Lloyd AG moves to dismiss the complaint filed by Complainant Global Link Logistics, Inc. ("Global Link") on September 10, 2013 ("Complaint") for failure to state a claim upon which relief can be granted. The Complaint, which asserts violations of 46 U.S.C. § 41102(c), § 41104(3), and § 41104(10), fails to meet the applicable thresholds for stating a cause of action under the Shipping Act for three reasons:

1. The Complaint fails to meet the minimum pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), by failing to set forth sufficient factual allegations to state a claim to relief;
2. The Complaint is based on novel causes of action that are not consistent with the Shipping Act or any Commission precedent under the cited sections, and seeks to revive rights and authorities that were purposefully withheld or abolished by Congress in the Ocean Shipping Reform Act of 1998; and
3. The Complaint, which was filed in response to a demand by Hapag-Lloyd for arbitration for breach of service contract, raises contract law defenses, but not colorable Shipping Act claims, and thus should be dismissed pursuant to 46 U.S.C. § 40502(f).

I. COMPLAINT

The instant proceeding was commenced by the filing of a complaint against Hapag-Lloyd by Global Link. The Complaint was filed in response to Hapag-Lloyd's demand for payment of $535,500 in liquidated damages for Global Link's MQC shortfall for its 2012 service contract, and Hapag-Lloyd's subsequent a request for arbitration before the Society of Marine Arbitrators ("SMA") regarding those damages.[1] It appears that the Complaint was filed in an effort to delay or preclude arbitration from proceeding on Hapag-Lloyd's breach of contract claim.[2]

Global Link asserts violations of three sections of the Shipping Act:

- 46 U.S.C. § 41104(10): A carrier may not "unreasonably refuse to deal or negotiate." Global Link argues that Hapag-Lloyd's refusal to agree to provide Global Link certain service contract rate reductions in order to keep rates at "competitive" levels violated this section.
- 46 U.S.C. § 41104(3): A carrier may not "retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." Global Link avers that Hapag-Lloyd violated this section by quoting Global Link rates that were higher than rates provided to other shippers, and seeking to impose liquidated damages for Global Link's failure to tender the minimum quantity called for in the contract.
- 46 U.S.C. § 41102(c): "Practices in Handling Property— A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with

[1] *See* Attachment A, demand for arbitration.
[2] *See* Attachment B, letter from counsel for Complainant dated September 10, 2013, stating "In light of Global Link's position that Hapag-Lloyd's service contract is void ab initio, the appropriate forum for resolution of this matter is the Federal Maritime Commission rather than via arbitration."

receiving, handling, storing, or delivering property." Global Link argues that this section was violated – and the contract itself is void – because the underlying contract at issue in this docket does not to meet the definition of "service contract" in the Shipping Act. Specifically, Complainant alleges that the contract does not have a defined rate due to contract clauses adopting tariff GRI and accessorial charges, and it has a "one-sided" service commitment, *i.e.*, the penalties for carrier's failure to provide service are less than those imposed on shipper for failure to meet the minimum quantity of cargo shipped. Moreover, Complainant alleges that § 41102(c) was violated by a claimed failure by Hapag-Lloyd to agree to reduce Global Link's MQC after refusing to provide Global Link with certain requested rate reductions.

II. ARGUMENT

A. Global Link's Complaint Should Be Dismissed for Failure to State a Claim

1. Standard

Under Rule 12 of the Commission's Rules of Practice and Procedure, the Commission follows the Federal Rules of Civil Procedure in instances that are not covered by the Commission's Rules and to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. "As the Commission's Rules do not address motions to dismiss for . . . failure to state a claim, Federal Rule[] . . . 12(b)(6) appl[ies] in this case." *Mitsui O.S.K. Lines, Ltd v. Global Link Logistics, Inc. et al.*, 2011 WL 7144008, *11 (FMC: Served Aug. 1, 2011) *(citing The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (FMC: Served Aug. 2, 2007)). *See also Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04 (ALJ Apr. 23, 20l0) (Memorandum and Order on Respondent Tianjin Hua Feng Transport Agency Co.,

Ltd.'s Motion to Dismiss Pursuant to Fed R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim).

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). However, a complaint should be dismissed if it does not "contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *See* C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004). As the U.S. Supreme Court has made clear: "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly*, 550 U.S. at 555). Moreover, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the complaint's framework, they *must* be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) (emphasis added).

The Global Link Complaint falls far short of these pleading standards. As discussed below, the Complaint contains claims under three sections the Shipping Act of 1984, all of which rely impermissibly on legal conclusions, lack a foundation of supporting factual allegations, and set out claims that have no legal basis in the text of the Shipping Act and Commission precedent. These claims are appropriately dismissed as a matter of law based on the text of the complaint itself.

2. Global Link Fails to State a Claim for Unreasonable Refusal to Deal

The Global Link Complaint fails to allege facts that support its claim under 46 U.S.C. § 41104(10) for refusal to deal, and fails to address the Commission's long-established elements of a violation under this section. Instead, Complainant appears to rely on a new and legally unsupportable theory of § 41104(10) authorizing FMC rate regulation and compulsory adjustment of existing service contract rates. All claims under this section, therefore, should be dismissed.

Section 41104(10) provides that a common carrier may not "unreasonably refuse to deal or negotiate." This provision of the Act does not guarantee the right to enter into a contract, much less a contract with any specific terms. *New Orleans Stevedoring Company v. Board of Commissioners of the Port of New Orleans, 2002 WL 33836158 (FMC, Served Jun. 28, 2002).* That section requires only that carriers "refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *Id.* In other words, Section 41104(10) comprises two elements: (1) a refusal to deal or negotiate; (2) that is objectively unreasonable because it has no legitimate transportation-related reason. *See id.* Global Link has failed to allege facts that support these elements and, in fact, pleads facts inconsistent with a Section 41104(10) violation.

a. The Complaint Does Not Allege That Hapag Refused To Deal or Negotiate

To state a claim under Section 41104(10), Global Link must allege facts that, if true, establish an actual refusal by Hapag to deal or negotiate with Global Link. *See, e.g., Chilean Nitrate Sales Corp. v. San Diego Unified Port District*, 24 S.R.R. 1314 (1988) (no refusal to deal where the complainant had not attempted to negotiate). A refusal to deal or negotiate is established where a carrier refuses to consider a bona fide offer from an offeror without justification. *See Canaveral Port Auth. – Possible Violations of Sec. 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (2003). In *Canaveral Port Auth.*, the Commission

found an unreasonable refusal to deal where the Port, without good cause, expressly refused to even consider an application submitted by a tug company application for a tug franchise.

Once a carrier has considered a bona fide offer, however, a party's rejection of the offer cannot simply be equated with a refusal to deal or negotiate. *See In Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993). In *Seacon Terminals*, Seacon alleged that the Port of Seattle unlawfully excluded it from the port by refusing to deal and negotiate a new lease. *Id*. at 899. The Commission found that the port negotiated with Seacon for over a year, and because no new lease was signed with Seacon, the port's negotiation and eventual agreement for a lease with another company was a reasonable exercise of its business discretion. *Id*.

In this case, Global Link claims "Hapag acted in violation of 46 U.S.C. § 41104(10) in unreasonably refusing to deal or negotiate in regard to rates it was charging under its Service Contract." Compl. ¶ QQ. Global Link, however, does not allege any facts that support this legal conclusion. To the contrary, Global Link acknowledges that the parties had a "course of dealing" for "many years" during which they negotiated and performed under "various Service Contracts," shipping thousands of TEUs of cargo. Compl. ¶¶ A-F, PP. Furthermore, Global Link acknowledges that the parties exchanged "repeated emails" in which Global Link "request[ed] specific rates" and to which "Hapag time and again responded." Compl. ¶ QQ. Therefore, the factual allegations in the Complaint effectively concede that Hapag did not refuse to deal or negotiate with Global Link.

Global Link seeks to recast Section 41104(10) as a mechanism for rate regulation. Under Complainant's reasoning, a carrier unlawfully "refuses to deal" whenever it refuses to capitulate to demands for commercial concessions when performing under an existing contract. Under this view, Section 41104(10) would become a device for rewriting service contracts to shift the risk of a declining market to the ocean common carrier. This approach to the statutory text is

inconsistent with Commission precedent, as well as Congress' deregulatory intent. As the Commission's decision in *Seacon Terminals* illustrates, when parties are already dealing and negotiating with each other, a carrier's rejection of a given offer or demand does not constitute a refusal to deal or negotiate. This is all the more clear in the context of rates charged under a service contract where the parties are actively dealing with each other. Since 1984, the Commission has had no authority to regulate the level of carrier rates; a tortured reading of Section 41104(10) cannot now afford the agency that power.[3]

Global Link has failed to allege facts that, if proven true, would establish a refusal on the part of Hapag to deal or negotiate with Global Link under Section 41104(10). On this basis, alone, therefore, all claims under Section 41104(10) must be denied for failure to state a claim.

b. The Complaint Does Not Allege That Hapag Made Refusals Without A Legitimate Transportation-Related Reason

Even if Global Link had alleged facts establishing the "refusal" necessary under Section 41104(10) (which it did not), "[a] refusal 'to deal or negotiate' is, in and of itself, not a violation of the Shipping Act." *Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 558, 563 (D.C. Cir. 1988). Rather, one also "must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect." *Id.* In this case, Global Link has alleged no facts that establish an unreasonable refusal to deal or negotiate.

As the Commission showed in *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R 886 (1993), what "is central to determining whether a refusal to deal or negotiate was reasonable" is whether the carrier "gave good faith consideration to an entity's proposal or efforts at

[3] Even before the extensive deregulation of service contracts in the Ocean Shipping Reform Act of 1998, rate regulation was statutorily off-limits to the FMC. *See* Section I of the FMC's Annual Report to Congress for each year from 1983-1998, explaining that the Commission's responsibilities included: "Receiving and reviewing tariff filings (but not the regulation of rate levels) by common carriers engaged in the US foreign commerce."

negotiation." *Docking and Lease Agreement by and between City of Portland, Main and Scotia Prince Cruises, Ltd.*, 2004 WL 1895827, *3 (FMC: Served Aug. 23, 2004). Indeed, a refusal may be "debatable" or even characterized as "overly conservative, inflexible and insufficiently responsive to the needs of users of the port" without "rationally be[ing] characterized as unreasonable or as being unrelated to legitimate transportation considerations." *New Orleans Stevedoring Company v. Board of Commissioners of the Port of New Orleans*, 2002 WL 33836158, *9 (FMC: Served Jun. 28, 2002).

At a minimum, therefore, to state a claim under Section 41104(10), a party must allege facts that, if proven true, would establish a refusal to deal that was made without "good faith consideration" and "unrelated to legitimate transportation considerations." *See Docking and Lease Agreement by and between City of Portland, Main and Scotia Prince Cruises, Ltd.*, 2004 WL 1895827, *3 (FMC: Served Aug. 23, 2004); *New Orleans Stevedoring Company v. Board of Commissioners of the Port of New Orleans*, 2002 WL 33836158 *9 (FMC: Served Jun. 28, 2002). The Global Link Complaint, however, fails utterly to satisfy this pleading requirement. Although the Complaint refers to the parties' lengthy course of dealing and numerous emails on the subject of Global Link's demand for lower rates, the Complaint contains no allegations to the effect that Hapag failed to give its demands good faith consideration. Nor does the Complaint allege that Hapag rejected Global Link's demands for reasons that were unrelated to legitimate transportation considerations. While the parties clearly entered into a contract with pricing provisions applicable to the whole term of the contract, the Complaint contains no factual allegations that suggest Hapag acted unreasonably or otherwise outside of its legitimate business discretion when it decided to maintain those terms, perform in accordance with the contract, and expect its counterparty to do likewise.

Therefore, Global Link's claim under Section 41104(10) must be dismissed for failure to state a claim because the Complaint, in addition to its failure to allege facts supporting a "refusal to deal," also fails to allege facts supporting a refusal that is unreasonable and without a legitimate transportation reason.

3. Global Link Fails To State a Claim for Retaliation Under Section 41104(3)

The Global Link Complaint alleges no facts whatsoever in support of its retaliation claim under 46 U.S.C. § 41104(3). All claims under this section, therefore, should be dismissed.

In relevant part, Section 41104(3) provides that a common carrier may not:

> . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

(emphasis added). This section, which recodified Section 10(b)(5) of the Shipping Act of 1984, deals expressly with acts a carrier might take to "retaliate against a shipper" in response to acts such as "patroniz[ing] another carrier" or "fil[ing] a complaint." *Id*. Accordingly, to maintain a claim under Section 41104(3), a plaintiff must allege sufficient facts that, if proven true, would demonstrate the carrier actually "retaliate[d]" or "resort[ed] to other unfair or unjustly discriminatory methods *because* the [Plaintiff] shipper . . . patronized another carrier, or . . . filed a complaint, or for any other reason." 46 U.S.C. § 41104(3). *See also DSW Int'l, Inc. v. Commw. Shipping, Inc*., 2011 WL 7144019, * 13 (FMC: Served Mar. 29, 2011) (emphasis added) (Plaintiff must explain how the facts establish an act of retaliation).

Remarkably, Global Link does not allege a single fact that suggests Hapag retaliated against Global Link. In fact, Global Link does not allege in even a conclusory fashion that Hapag acted in a retaliatory fashion; in the terms of *Twombly*, it does not even attempt a "formulaic recitation of the elements of a cause of action." Instead, Global Link attempts to recast Section

41104(3) as a general prohibition against "unfair or unjustly discriminatory methods" regardless of whether they are retaliatory in nature. *See* Compl. ¶¶ RR-TT. The FMC has long rejected this misinterpretation of the statute. *California Shipping Line, Inc. v. Yangming Marine Transp*., 25 S.R.R. 1213, 1230 (1990). In *California Shipping*, the FMC "conclude[d] . . . that 10(b)(5) of the 1984 Act [*i.e*., 46 U.S.C. § 41104(3)] applies *solely to retaliatory acts* of a carrier against a shipper who has sought the services of another carrier, including retaliatory practices designed to stifle outside competition." *Id*. Indeed, as the FMC explained, if this section "were applied to any act of discriminatory conduct . . . it could render other provisions of the Act prohibiting discrimination superfluous." *Id*.

In pleading facts describing only simple discrimination in this count, Complainant actually seems to be pleading a violation of the Shipping Act of 1984's now-abolished nondiscrimination provisions in the former Section 10(b)(10) and (12). As discussed further below, Congress purposefully eliminated those prohibitions with the Ocean Shipping Reform Act of 1998 ("OSRA"). With the OSRA deregulation, Congress made clear that the former prohibitions on "undue or unreasonable prejudice or disadvantage" and "any rate or charge that is unjustly discriminatory between shippers" no longer apply to service contracts or to service provided thereunder. Complainants, therefore, should not be permitted to misuse Section 41104(3) as a work-around to pursue discrimination claims that Congress specifically deauthorized by amendments to the Shipping Act.

The defects are plain on the face of Global Link's Complaint. To state a claim for relief under Section 41104(3), a complaint must contain sufficient factual allegations of "retaliatory acts" on the part of the carrier. *See id*. Global Link has made *no* such allegations and, therefore, its claim under Section 41104(3) must be denied for failure to state a claim.

4. Global Link Fails To State a Claim Under Section 41102(c) for "Entering Into A Service Contract That Does Not Comport With The Shipping Act's Definition Of A Service Contract."

In Paragraph II, the Complaint avers that Hapag failed to establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, handling, storing or delivering property in violation of 46 U.S.C. § 41102(c), by entering into a service contract with Global Link that allegedly does not comport with the Shipping Act's definition of a service contract in 46 U.S.C. § 40102(20).[4]

In so arguing, Complainant seeks to establish an entirely novel and unprecedented cause of action under § 41102(c). This claim must be dismissed, however, because (1) Complainant fails to allege the existence of any unreasonable "regulations and practices relating to the receiving, handling, storing or delivering property" as § 41102(c) contemplates; (2) the alleged contract nonconformities to which Complainant refers are plainly authorized under the Commission's rules; and (3) Congress purposefully removed from the Commission the statutory authority to regulate the reasonableness of rate levels and service commitments set forth in service contracts (except in certain narrowly-defined circumstances not applicable here).

a. The Complaint Does Not Allege Unreasonable Regulations or Practices Relating to "Receiving, Handling, Storing or Delivering Property"

The Complaint fails to meet the *Twombly* pleading threshold with regard to its challenge to the service contract's validity, as it does not allege any facts linking the contested service contract terms to "receiving, handling, storing or delivering property," as required to make out a violation of Section 41102(c). Rather than plead facts to address the required statutory elements,

[4] Under 46 U.S.C. § 40102 (20) ("Service contract"), the term "service contract" means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which—(A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.

Global Link lays out unprecedented legal arguments suggesting that certain clauses in its service contract are inadequate to meet the statutory definition of "service contract." Specifically, Global Link asserts that the service contract's incorporation of general rate increases, accessorials and other charges set forth in Hapag-Lloyd's tariff is impermissible, suggesting that such cross-referencing was inconsistent with the requirement that service contracts include a "certain rate or rate schedule."

Complainant further asserts that the carrier service obligation set forth in the service contract was "one-sided" and was therefore not a "defined service level" as that phrase is used in the definition of "service contract." Compl. ¶ JJ. Specifically, Global Link argues that "[a]lthough on its face, the Service Contract at issue imposed an obligation on Hapag to provide a defined service level, this obligation was not real," because the penalties for failure to perform were less than those imposed on Global Link for nonperformance, and involved only credit for future service. There is no Commission precedent under Section 41102(c) to underpin this legal theory.

In constructing this novel and unprecedented claim under Section 41102(c), Global Link again makes no effort to meet its *Twombly* obligation to plead facts that connect its grievance to the statute it invokes, *i.e.*, practices and regulations relating to "receiving, handling, storing or delivering property." The Complaint ignores the fact that Section 41102(c) is narrow and specific in the scope, and cannot be distorted to accommodate Global Link's attempt to impose new "reasonableness" standards onto the content of service contract rates and service commitments.

Section 41102(c) does not authorize regulation of service contract rates, charges, or cargo accommodations. The Commission's actual authority to address unfair practices in connection with rates, charges, and cargo accommodations is set forth clearly in a different section of the Act – 46 U.S.C. § 41104(4) – and that power clearly is limited only to tariff service, and not to service

contracts. As discussed further *infra*, with the Ocean Shipping Reform Act of 1998, Congress purposefully amended the Shipping Act to make clear that the Act does not provide a cause of action for unfair rates, charges or space accommodations in connection with service contracts.[5] Accordingly, Complainants have no cognizable claim under the Shipping Act to regulate the reasonableness of service contract rates or service commitments.

b. The Commission's Regulations and Policy Expressly Authorize Cross-Referencing of Tariff Terms

Despite Complainant's unique protestations, the Commission's rules expressly authorize carriers to cross reference tariff terms in service contracts. Under 46 C.F.R. § 530.8(c) service contract terms "may not: (1) Be uncertain, vague or ambiguous; or (2) Make reference to terms not explicitly contained in the service contract itself unless those terms are contained in a publication widely available to the public and well known within the industry." The Commission confirmed in the supplementary material in Docket 98-30, *Service Contracts Subject to the Shipping Act of 1984 - Interim Final Rule*, 64 Fed. Reg. 11186, that cross-referencing to tariff terms is permitted under 46 C.F.R. § 530.8(c).[6] In that rulemaking, the Commission explained that carriers may cross-reference their own tariff publications or conference tariff publications in their filed service contracts. This provision was intended to allow carriers to refer to rules of general applicability (free time and demurrage, bunkering rates, currency matters, etc.) for the boilerplate or terms which appear in all their contracts. Further,

[5] *See* Senate Report 105-61, *Ocean Shipping Reform Act, Report of the Committee On Commerce, Science, And Transportation on S. 414* ("S. Rep. 105-61") which stated: "Current section 10(b)(6), to be redesignated as section 10(b)(4), would be amended to clarify that it applies only to service pursuant to a tariff and includes charges as well as rates." http://www.gpo.gov/fdsys/pkg/CRPT-105srpt61/html/CRPT-105srpt61.htm.

[6] *See also* http://www.fmc.gov/questions/, which explains: "Q: May service contracts cross reference other material, specifically a published tariff? A: Service contracts may refer to any widely available published material which is well known in the industry. . . . Such cross-referencing may also include reference to the carrier party's general rules tariff."

the Commission stated that it was Congress's intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements.

In authorizing this practice of linking tariff rules to service contracts, the Commission has long recognized that the practice is ubiquitous in the carrier industry. In the comprehensive FMC study *The Impact of The Ocean Shipping Reform Act of 1998*, the Commission noted:

> Most ocean carriers use tariffs not only to publish rate information, but to link their service contracts to basic terms and conditions that are spelled out in tariffs -- particularly GRIs, surcharges and accessorial charges.
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> * * *
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> With respect to freight rates and surcharges, both samples showed that less than 10 percent of the contract rates were completely all-inclusive, while over 90 percent of the contract rate provisions were linked to or referenced a separate carrier or conference tariff. In addition, upwards of 35 percent of contracts in both samples contained a GRI clause or other provisions for the general increase of freight rates connected to tariff rate increases.

Accordingly, it appears that the specious legal argument Complainant advances – that its service contract is unlawful and void – is facially inconsistent with Commission regulations and policy regarding an industry practice well-understood by the agency.[7]

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[7] http://www.fmc.gov/assets/1/Page/OSRA_Study.pdf. *See also* House Transportation and Infrastructure Committee Subcommittee on Coast Guard and Maritime Transportation *Update On Federal Maritime Commission's Examination Of Vessel Capacity*, Hearing June 30, 2010 (http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57249/pdf/CHRG-111hhrg57249.pdf.) Chairman Lidinsky and Commissioner Dye outlined the scope of the Commission's service contract authorities for the Subcommittee. With regard to linking tariff surcharges, Chairman Lindinsky explained that it the responsibility of the commercial parties to protect their own interests through commercial negotiations over service contract terms:

> "Now, when the service contract is formed, the shippers have an opportunity to protect themselves against certain surcharge increases and unfortunately a lot of times they don't. So the carriers, in an attempt to make up lost revenue, have imposed additional surcharges to bring them back to where they wanted to be from two years ago. But the core of the issue remains this, that service contracts have been around for about a dozen years now in their present form. Nobody doubts they have been a success in terms of numbers. There are over two million of them on file today, individual deals between the

While the Commission is not a court of equity, it also is worth noting that Complainant does not come to this argument with clean hands. Global Link states in its Complaint that it has operated under service contracts with Hapag-Lloyd since 2007, presumably reaping the benefits of the bargains that it has struck for those contract years. Now that Complainant is being called to arbitration for breaching its contractual commitments, it attacks for the first time the contract as legally defective and void, looking for an excuse not to be bound to perform. In so doing, it seeks an inequitable windfall, a regulatory escape from a contract to which Complainant clearly agreed.

3. Global Link Fails To State a Claim for Unreasonable Practices Under Section 41102(c) for Alleged Failures to Reduce Service Contract Rates or Minimum Quantity Commitment

Global Link claims that Hapag-Lloyd violated Section 41102(c) through a "failure to negotiate reasonable rates," relying principally on allegations that Hapag-Lloyd refused to agree to lower rates to more "competitive" levels, which allegedly caused Global Link to lose business.[8] Compl. ¶¶ C, K-S, and V-AA. Complainant further alleges that Hapag-Lloyd violated Section 41102(c) by not deciding to reduce or roll over the minimum quantity commitment (MQC) at the end of the service contract term, when Complainant failed to ship the required minimum volume. Compl. ¶¶ EE-HH. According to the Complaint, Hapag-Lloyd violated section 41102(c) when it sought to collect the liquidated damages set forth in the contract, because the parties allegedly had

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> importer-exporter and the carriers. Both sides are responsible for the state of being where they have not fully taken advantage of these opportunities in the service contract to negotiate provisions to insulate against surcharges, or for carriers to protect themselves against phantom bookings by shippers."

[8] In arguing that Hapag-Lloyd is responsible for Global Link's alleged loss of business, Complainant obfuscates the legal principle that NVOCCs are common carriers in their own right, free to set their own rates for their shipper customers at whatever level they select. Under 46 U.S.C. § 40102 the term "non-vessel-operating common carrier" means "a common carrier that—(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." That is, an NVOCC acting as a shipper purchases vessel space from a vessel operator, then seeks to profit by reselling that space as a carrier to shippers at prices set by the NVOCC itself. Nothing in the Shipping Act creates a right of profitability for NVOCCs, however, and nothing in the Act requires that ocean common carriers adjust long-term contract rates to ensure that NVOCCs can consistently resell without losses when the spot market declines.

followed a course of dealing whereby the MQC would be rolled over. Compl. ¶¶ LL-OO. The Complaint also objects in vague and general terms that Hapag-Lloyd failed to timely prepare service contract amendments, that those amendments it did prepare contained "errors that made the Service Contract unusable," and that "Global Link experienced service issues in regard to the PAX service." Compl. ¶¶ U-V.

As with Complainant's other Section 41102(c) theories, these alleged refusals to modify rates and minimum volume terms fail to state a claim under Section 41102(c). Complainant fails to allege the existence of any facts linking the disputed rate and volume terms to "regulations and practices relating to the receiving, handling, storing or delivering property," as the statute requires. Global Link neglects to meet the *Twombly* standard, and thus fails to state a claim for which relief can be granted.

In pressing ahead with a novel "just and reasonable practice" claim based on the reasonableness of service contract rates and MQC commitments, rather than "receiving, handling, storing or delivering property," it appears that Global Link is trying to invoke or resurrect the broad FMC regulatory powers over service contract rates and practices that Congress specifically abolished in the Ocean Shipping Reform Act of 1998. Before 1998, the Shipping Act of 1984 included provisions – particularly the former Section 10(b)(10-12) – that broadly barred all carrier unjustly discriminatory rates, undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage (including in connection with service contracts). However, this broad authority was removed from the Shipping Act in 1998, and Congress admonished the Commission to allow shippers and carriers maximum flexibility to craft service contracts without regulatory interference.

Under OSRA, the Commission's authority to regulate service contracting was sharply limited to three prohibitions, none of which apply in this case: (1) status-based discrimination

against ocean transportation intermediaries; (2) unjust discrimination against ports; and (3) undue prejudice regarding localities. The post-OSRA Shipping Act provides no statutory relief for a would-be claimant like Global Link seeking to raise claims of unreasonable practices in connection with particular service contract rates and volumes. The Senate Report that accompanied OSRA sums up its deregulatory purpose and effect well:

> New sections 10(b)(5) and (9) substantially increase the discretion given to common carriers to provide different service contract terms to similarly situated shippers. In addition to eliminating the current requirement in section 8(c) of the 1984 Act that ocean common carriers provide the same service contract terms to similarly situated shippers, the bill narrows the application of the prohibited acts with respect to service pursuant to common carrier service contracts. Sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would restrict common carrier service contracting flexibility in only three, narrow, ways.
>
> First, sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would protect localities from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts. . . . Second, the amendments made by this section would retain similar protections for ports from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts as currently exist under the 1984 Act through references to ports and localities. Third, the amendments made by this section would protect shippers and ocean transportation intermediaries from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts due to their status as shippers' associations or ocean transportation intermediaries.
>
> The Committee intends the application of sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, with respect to protection for shippers' associations and ocean transportation intermediaries to be limited to circumstances in which the prohibited actions are clearly targeted at shippers' associations and ocean transportation intermediaries in general, not to circumstances where the actions are targeted at a particular shippers' association or ocean transportation intermediary. An example of such prohibited activity would include a clear pattern of unjustly discriminatory practices by a common carrier with respect to all shippers'

> association service contracts. The Committee expects the amendments to the 1984 Act by the bill will result in a much more competitive environment for ocean transportation rates and services. This environment should provide shippers' associations and ocean transportation intermediaries with more options when shopping for ocean transportation services and free common carriers to compete with each other to obtain shippers' associations and ocean transportation intermediaries as customers. Therefore, the Committee believes that shippers' associations and ocean transportation intermediaries require less protection as individuals in this more competitive marketplace. The Committee intends that common carriers be afforded the maximum flexibility to differentiate their service contract terms and conditions with respect to individual shippers and ocean transportation intermediaries in this more competitive environment. The Committee directs the FMC, and its successor, to focus the efforts of its limited enforcement resources, with respect to common carrier service contracts, on the most egregious examples of unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracting.

S. Rep. 105-61 (1997) (emphasis added).[9] It is clear from this legislative history that Congress has tightly constrained the Commission's authority to regulate service contracts, and plainly did not intend to create a cause of action under the Shipping Act for alleged unreasonable or discriminatory service contract terms or practices "targeted at a particular . . . ocean transportation intermediary."

The Complaint deploys Section 41102(c) in a manner that is unprecedented, decoupled from the statutory text, and irreconcilable with Congress' mandate regarding the elimination of service contract regulation outside of narrowly-prescribed circumstances. Section 41102(c) cannot be distorted to apply "reasonableness" standards on service contract rates and quantities, commercial negotiations thereof, and decisions to seek arbitration regarding alleged service contract breaches. Accepting Complainant's legal position that these are cognizable claims under Section 41102(c) would do fundamental violence to the statutory scheme Congress crafted

[9] U.S. Senate Committee on Commerce, Science and Transportation, *Ocean Shipping Reform Act.* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt61/html/CRPT-105srpt61.htm.

in OSRA, and would turn the clock back to the legal standards of the Shipping Act, 1916. Accordingly, Global Link's Complaint must be dismissed for failure to state a claim for which relief can be granted.

B. Global Link's Complaint Should Be Dismissed Pursuant to 46 U.S.C. § 40502(f).

1. Standard for Breach of Contract Disputes

The Shipping Act requires that actions for breach of contract lie in a district court or (as is the case here) another forum agreed by the parties, not at the Commission. Specifically, 46 U.S.C. § 40502(f) states, in relevant part: "Remedy for Breach.— Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court."[10]

The FMC applies this standard by reviewing complaints brought before it to determine "whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act." Docket No. 99–24, *Cargo One, Inc. v. COSCO Container Lines Co., Ltd*., FMC No. 99-24, at 12 (Oct. 31, 2000). When making its determination, the FMC places the burden upon the party alleging a Shipping Act violation before the FMC to overcome any presumption to the contrary. *See*, *e.g*., Docket No. 02-04, *Anchor Shipping v. Alianca*, (FMC May 10, 2006).

In a recent decision of the United States Bankruptcy Court for the Southern District of New York, *In re The Containership Co*., No. 11-12622 (Bankr. S.D.N.Y. Feb. 10, 2012), it was held that the FMC does not have exclusive or primary jurisdiction over allegations which are in

[10] Chairman Lidinsky urged Congress in 2010 to "change the Shipping Act's exclusive remedy provision for these service contract issues to initially go to the Commission." *See* House Transportation and Infrastructure Committee Subcommittee on Coast Guard and Maritime Transportation *Update On Federal Maritime Commission's Examination Of Vessel Capacity*, Hearing June 30, 2010 (http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57249/pdf/CHRG-111hhrg57249.pdf.) However, the resulting legislation (H.R. 6167, which also would have restored some FMC authority to regulate service contract terms and allocation of space) attracted minimal support, and Congress has retained OSRA's market-based approach to service contract service without change. http://www.govtrack.us/congress/bills/111/hr6167.

the nature of defenses to service contract breach of contract cases. That case is particularly instructive for the instant docket, as it involved NVOCCs facing breach of contract claims for failing to meet service contract minimum volume commitments.[11] As in this case, the NVOCCs sought to deflect the contract enforcement actions by having the matters taken up by the FMC, claiming various carrier violations of the Shipping Act and arguing that the "service contracts are invalid and illusory because the Debtor [carrier] did not commit to provide a defined level of service as required by the Shipping Act." *Id.* at 4. The court conducted a thorough review of applicable precedent and held that the NVOCCs claims "revolve around a central theme: whether the Debtor prevented the Movants from meeting their contractual obligations," and therefore "are in the nature of affirmative defenses to the underlying breach of contract claims in these adversary proceedings and are matters commonly addressed by the federal courts." *Id.* at 14. Citing *Cargo One*, the court held that "[i]n sum, [NVOCC] Movants' conclusory allegations fail to demonstrate that there is a technical issue or policy consideration to justify deferring to the FMC under the doctrines of exclusive or primary jurisdiction." *Id.* at 16.

2. The Instant Case is a Breach of Contract Dispute

In the instant case, there clearly is a contract dispute underway regarding Global Link's breach of its service contract commitments, and Hapag-Lloyd has sought arbitration as contemplated by the contract. Compl. ¶ HH. Global Link is resisting that arbitration, claiming the FMC is the "appropriate forum for resolution of this matter" despite 46 U.S.C. § 40502(f). However, none of the claims Global Link asserts are "peculiar to the Shipping Act," under the *Cargo One* test. Indeed, as explained above, most of Global Link's claims (particularly those seeking regulation of contract rates, service commitments and amendment negotiations on

[11] Attachment C.

reasonableness or non-discrimination ground) are not legally grounded in the modern-day Shipping Act at all.

The Complaint does set forth some non-specific assertions regarding contract administration and performance. *See* Compl. at ¶¶ U-W. For instance, Complainant alleges in vague terms that that Hapag-Lloyd failed to timely prepare contract amendments or submitted them to Complainant with errors, experienced "service issues" and "internal confusion," and wrote to Global Link stating that it wanted to reduce its space allocation. *Id*.. While these allegations do not support violations of the Shipping Act sections cited in the Complaint, they are the sort of contract formation or performance defenses a party ordinarily would raise in defending a breach of contract action. Complainant's arguments that its non-performance was due to "service issues" or performance failures on the part of the carrier appear to be entirely appropriate for consideration as defenses in an SMA breach of contract arbitration. Similarly, if Complainant wishes to argue that the interpretation or application of the contract terms is impacted by the "course of dealing" between the parties, then the SMA arbitration – not the Commission – would appear to be the appropriate forum to press such defenses.

III CONCLUSION

Global Link is using this docket to derail what should be a straightforward breach of contract arbitration. Already it is requesting an astonishing volume of discovery (mostly unrelated to the contract at issue) to support its legally baseless theories of unreasonableness and discrimination in service contract rates and terms. Accordingly, allowing Complainant to proceed forward at the FMC with these claims would result in extraordinary and unwarranted costs and delays, and severely prejudice Hapag-Lloyd's ability to seek enforcement of the service contract before an arbitrator.

A ruling by the Presiding Officer that Complainant's novel and unprecedented claims are cognizable violations under the Shipping Act would not only harm Respondent, but it also would do violence to the statutory scheme set forth in OSRA and have far-reaching implications for service contract carriers and shippers industry-wide. Accordingly, Respondents respectfully request that the Complaint be dismissed in full, and this proceeding be discontinued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion to Dismiss to be served October 17, 2013, via e-mail upon the following:

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